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ISAAC RAY, M.D.

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Dr Hays
With respects of the
Author.

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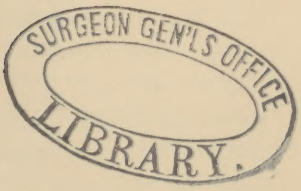

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CONFINEMENT OF THE INSANE.

UNTIL within a comparatively recent period, hospitals for the insane were used only for those who were supposed to be dangerous to others, or who needed public support; and admission was procured, on the order of the judicial or municipal authorities. As the nature of mental diseases became better understood, the hospitals began to be regarded as being well fitted for the cure of curable cases, and, at last, this has got to be their principal purpose, insomuch that those who were held merely for safe keeping have had to give place to those who sought for recovery under their healing influences. This change of function occurred so gradually, and in such strict accordance with an enlightened humanity, that no additional legislation seemed to be necessary to sanction a step which, though prompted by the best of motives, was unaccompanied by any of those legal formalities that were required for the admission of other classes of patients. The danger of these institutions being converted to the nefarious purpose of depriving sane persons of their liberty, was scarcely thought of. A crime so revolting to every sentiment of right and humanity, and requiring the co-operation of parties so unlikely to work together, seemed to be so improbable as to make any special legislation supererogatory. So, too, the duty of placing the insane in establishments that were regarded as best calculated to effect their restoration, seemed to spring so naturally from the purest affections of our nature, as to require no act of the legislature to give it force and validity. Fifty years ago, it

struck the people of that generation, that to legalize such a duty was like re-enacting a law of nature.

Of late years, with little or no foundation therefor, a change of sentiment has occurred, whereby admission to hospitals for the insane has come to be regarded, to some extent, as exceedingly liable to be perverted by bad men from its proper purpose. To prevent this result, additional legislation has been proposed, which should surround this measure with safeguards commensurate with the abuses that threaten it. Such legislation, varying considerably in its character, has been actually adopted in a few States. In some, it has refrained from disturbing the right and duties of friends as prompted by natural affection and consecrated by time-honored practice. In others, it has substituted for these the action of public authorities; and a service of love and humanity has been replaced by an unfeeling process of law. With these exceptions, however, there has been no change of law respecting the confinement, or, technically speaking, the isolation, of the insane. How far the right of friends exists, under the common law, to provide for the insane as they would for any other description of sick persons, — that is, by giving them the benefit of all the means and appliances which a progressive philanthropy and science have furnished, — is not very clearly defined; for, in the few cases that have been reported, the decisions of courts have been somewhat conflicting. Nor has all uncertainty been removed, even where laws have been specially enacted for this purpose. And thus it happens that in regard to a measure involving the highest welfare of a large class of persons, we have the utmost diversity of opinion; and the public mind is vexed by wild and extravagant projects utterly inconsistent with existing modes of thought and established customs. In a matter so closely connected with the dearest interests of families, one, too, which so easily arouses the prejudices of the multitude, the law should give no uncertain sound. No one should be in doubt how far his duties to the victim of disease are modified by the single fact that the disorder is seated in the brain, rather than in the stomach or lungs; nor should any one run the risk of finding an office of kindness and humanity made the occasion of a troublesome suit at law. As to the necessity of some legislation on this subject, there can scarcely be two opinions; but we shall be better prepared to determine exactly what it should be by considering the existing law as declared by judicial authorities.

The case of *Colby* v. *Jackson*, 12 N.H. 526 (1842), was an action of trespass for assault and battery, and false imprisonment, in which the plaintiff claimed damages of the defendant, for having placed him, while insane, in confinement, without having strictly complied with the requirements of the statute. The selectmen of the town, the defendant being one, being solicited to take charge of Colby, who was supposed to be dangerously insane, applied to the Judge of Probate for authority to act, and were accordingly directed by him to make inquisition into the case. This they did, but made no return of the inquisition, though they found him to be dangerously insane, and had him confined in a cage at the poor-house for two or three months. It was urged by the defendant that the dangerous element in the patient's case atoned for the irregularities in the mode of commitment; but a verdict was given for the plaintiff, with nominal damages. Both parties appealed, and Chief Justice Gilchrist, in rendering the decision of the court, declared, in the most unqualified manner, that an insane person, however dangerous he might be, could not be kept in confinement beyond the period necessary for obtaining an inquisition, or some other legal process. "The right to imprison the plaintiff," he said, "was an authority given by law. . . . Such an authority is possessed by no person unless under the sanction of, and after compliance with, the forms of law. No relationship, however near, no ties of friendship, however close, between the lunatic and his keeper, would render the existence of such a rule consistent with the safety of the community. . . . Every cage would be a licensed private madhouse. . . . Any citizen could confine his neighbor, provided only he were insane; and, if the confinement were to continue as long as the insanity, both would probably end only with the life of the patient."

In *Nottidge* v. *Ripley* (12 Law Rep. 279), which was an action to recover compensation in damages for incarcerating the plaintiff in an asylum, tried in the Court of Exchequer, June 23, 1848, it appeared that the plaintiff was placed in a private asylum by her mother and brother-in-law; all the requirements of the statute for the admission of patients into asylums having first been strictly complied with. The insanity was not denied; but inasmuch as she did not appear to have been dangerous, the counsel for the plaintiff contended that the confinement was illegal, and claimed heavy damages. Their view of the illegality of the

measure was fully sustained by Sir Frederick Pollock, the Lord Chief Baron, and for the reason alleged. His views are summarily expressed in one of the head-notes of the case. "Unless a person alleged to be insane is of unsound mind, and dangerous to herself and others, no person can remove her from her home to an insane asylum, without the sanction of a commission of lunacy." To one of the Commissioners in Lunacy, who was a witness in the case, and whose especial business it was to look after the asylums, he said, "It is my opinion you ought to liberate every person who is not dangerous to himself or to others."

In the first of these cases, the rule is laid down in the most unequivocal manner, that, under the common law, no person can be confined on account of insanity, without some process of law. In the other, an exception is made in favor of such cases as are supposed to be dangerous. As the statute (8 & 9 Vict. c. 100) prescribes certain conditions without which no person can be received into any asylum or hospital for the insane, this may be fairly considered as equivalent to a grant of authority. It can hardly be supposed that this provision was overlooked at the trial, though it is a curious circumstance that it was not once mentioned by either party. However this may be, it appears none the less clearly what was the opinion of the court respecting the common law on this matter.

In the matter of Shuttleworth, 9 Q. B. 651 (1846), a somewhat different view was taken. This was an attempt, by means of a writ of *habeas corpus*, to obtain the discharge of a lady from an asylum in which she had been detained several months, for the reason that one of the queries which always accompany the order of admission was not answered precisely in the words prescribed by the act. The return to the writ was, that she was "of unsound mind, memory, and understanding, and incapable of governing herself or her property, or managing her affairs, and unfit and unsafe to be at large." Governed by this return, Mr. Justice Coleridge observed that "he was not prepared to concede that if the certificate were deficient, they were to discharge." To the counsel who claimed the discharge on the ground that the confinement was illegal, the Chief Justice, Lord Denman, said, "Is not the confining of a dangerous lunatic founded on common law principles?" And, as if to recognize in the most distinct manner the right of friends to care for the patient, even though it involved

confinement, he further said, "If the court thought a party unlawfully received or detained was a lunatic, we should still be betraying the common duties of members of society, if we directed a discharge. . . . Should we, as judges or individuals, be justified in setting such a party at large? . . . I should be abusing the name of liberty if I were to take off a restraint for which those who are most interested in the party should be most thankful."

In *Commonwealth, ex relatione Nyce*, v. *Kirkbride*, county of Philadelphia, March 7, 1868 (Phil. Press), the relator claimed his discharge from the Pennsylvania hospital for the insane, where he had been kept several months, on the ground that if insane he was not dangerously so. The return to the writ was that he was insane, and that his discharge would be dangerous to his family. Upon this point much evidence was given on both sides. The two physicians of the hospital, and seven other witnesses, most of them relatives, concurred in establishing the correctness of the return, while a few others testified, quite positively, that he was sane. The court, not being satisfied that he was dangerous, directed him to be discharged. In rendering the judgment of the court, Judge Brewster declared "that the power to remand, *where there has been no finding of lunacy*, should be confined to the preservation of the patient, and the public peace and morals."

Shortly after the hearing of the case just mentioned, Moore, an inmate of the same institution, was brought before the same court, on a writ of *habeas corpus*. His discharge was claimed on the ground that he was not then, and never had been, insane. In declaring the opinion of the court, Judge Allison, while distinctly recognizing the fact of Moore's insanity when admitted into the hospital some eleven or twelve weeks previously, regarded him as so much improved, "though manifesting, in court, considerable excitement of manner," as to conclude that "it would not be unsafe to discharge him from custody, or that he would do violence to himself or others." On this ground, mainly, "aided by the belief that his entire recovery would be aided by freedom rather than by farther restraint of liberty," the court directed his discharge.

In January, 1845, Josiah Oakes was brought before the Supreme Judicial Court of Massachusetts, on a writ of *habeas corpus;* the object of which was to procure his discharge from the McLean Asylum for the Insane, to which he had been committed by his

family, on the 16th of the previous month. Chief Justice Shaw, in delivering the opinion of the whole court, replied to the allegation of counsel that the constitution makes it imperative upon the court to discharge any person detained against his will; and that by the common law, no person can be restrained of his liberty, except by the judgment of his peers, or the law of the land. "We think," said he, "there is no provision, either of the common law or the constitution which makes it the duty of the court to discharge every person, whether sane or insane, who is kept in confinement against his will. The provision, if it be true, must be general and absolute, and not governed by any questions of expediency to suit the emergencies of any particular case. The right to restrain an insane person of his liberty is found in that great law of humanity which makes it necessary to confine those whose going at large would be dangerous to themselves or others. . . . The necessity which creates the law, creates the limitation of the law. . . . If there is no right to exercise that restraint for a fortnight, there is no right to exercise it for an hour. And if a man may be restrained in his own house, he may be restrained in a suitable asylum, under the same limitations and rules. . . . The provisions of the constitution, in relation to this subject, must be taken with such limitations, and must bear such construction, as arise out of the circumstances of the case. Besides, it is a principle of law that an insane person has no will of his own. In that case, it becomes the duty of others to provide for his safety and their own. . . . The question must then arise, in each particular case, whether a person's own safety, or that of others, requires that he should be restrained for a certain time, and whether restraint is necessary for his restoration, or will be conducive thereto. The restraint can continue as long as the necessity continues. This is the limitation, and the proper limitation." The court being satisfied that Oakes was insane when admitted into the asylum, and that he had not yet fully recovered, refused to discharge him, adding, that "the restraint should last as long as is necessary for the safety of himself and of others, and until he experiences relief from the present disease of his mind." 8 Law Rep. 122.

Here the point is well made, that, if the common law does not authorize the confinement of the insane, its operation must be absolute and unconditional. It makes no exception in favor of those who are dangerous, or are offensive *contra bonos mores*. If

its operation may be suspended to meet one emergency, so it may to meet another. If the apprehension of danger may warrant us to override the law, then, for a reason equally strong, the promotion of the patient's comfort and restoration may have the same effect. And the court takes care, by repeated iterations, to have it understood, that the recovery of the patient is a sufficient warrant for his confinement in an asylum. And this, too, not merely for lack of any provision to the contrary, but as a result of the great law of humanity which makes such confinement a matter of duty incumbent on the friends of the patient. Here is recognized a law higher than the common law, which supplements its defects, and provides for duties of a nobler order than any which it enjoins.

The views of Chief Justice Shaw were fully indorsed, a few years later, in Pennsylvania, in the well-known case of *Hinchman* v. *Richie*, Brightly, 143 (1849). The plaintiff having been placed in an asylum by his friends, without any legal process, his counsel contended that the act was contrary to the Bill of Rights, and a violation of the constitution of Pennsylvania. The court, Judge Burnside, said, "I do not agree to that proposition: it would have been true, had he been charged with a crime: but the right to restrain an insane person of his liberty is found, as expressed by Chief Justice Shaw of Massachusetts, '*in the great law* of humanity.' The Pennsylvania hospital was in existence half a century before the adoption of the constitution of 1790, and it was in existence and operation, as well as this asylum, when the amended constitution of 1838 was adopted. So that those gentlemen (and they were men of talent and distinguished ability, in both conventions, and especially the convention of 1790) who formed this constitution, had the practice of the Pennsylvania hospital before them; and the late convention had before them, in addition to that, the practice of this asylum. I then negative the proposition, that it is a violation of the constitution of Pennsylvania so to arrest and confine an insane man."

Alluding to this case, Wharton and Stillé, in their Treatise on Medical Jurisprudence, say, "There are, necessarily, cases when the safety of property, and the health of the patient himself, require confinement in an asylum, though there be no danger of violence to himself or others; and it is not likely that the existence of such cases will be again judicially questioned. . . . The law, in such a case, undoubtedly is, that confinement is justifiable,

if either the safety of the patient or others require it, or it is necessary for his restoration to health."

The doctrine clearly implied, in most of these cases, is, that, without some legal process, insane persons cannot be held in confinement under the common law, though exception is made of such as are proved to be dangerous to themselves or others. Danger, then, is the element which is to legalize that which, without it, would be manifestly illegal. It is proper that a doctrine of such extreme importance, determining, as it must, the question of confinement or liberty, should be thoroughly understood, in order to avoid mistakes involving the most serious consequences. Let us, therefore, consider it by the light of professional observation, — the only light that can be trusted on a strictly professional subject, remote from men's ordinary thoughts and experience.

A proclivity to mischief is one of the most common features of insanity. Yielding to passions unchecked by moral or prudential restraints, controlled by delusions that are mistaken for the most vivid of realities, moved by impulses that are completely irresistible, delighted by what would otherwise have caused unutterable pain and disgust, they are, necessarily, by the very conditions of the case, dangerous. Not that the danger is always imminent, or always extreme. If passionate and quarrelsome, the patient may, for a while, be kept in good humor by adroit management; if suicidal, he may merely revolve the idea of self-destruction until a peculiarly favorable moment invites him to make the attempt; if strong delusions lead him to regard his dearest friends with distrust and aversion, he may long refrain from actual violence by lack of a vigorous will, that may come, sooner or later. Under the skilful management of a hospital, removed from countless causes of excitement, and guided by those who are well acquainted with the ways of the insane, he may cause no alarm; and, indeed, may seem, to a casual observer, quite free from dangerous dispositions. This element of insanity is so dependent on circumstances, so shielded from observation, so masked by amiable traits of character, so modified by physiological conditions, — by a little more or a little less blood in the head, by the approach of a menstrual period, or some unusual nervous movement, — that it may be easily overlooked by an unpractised eye. A long, close observation of a certain patient may enable one to say that he is harmless; but it would be the height of foolhardiness to say this of any patient on

the strength of one or two interviews. The records of insanity show that some of the most fearful acts of violence have been committed by those who were supposed to be harmless, and who, for years, had possessed unrestricted liberty. We do not deny that some insane persons may go all their days without harm to person or property; but we do deny that we ever can know with any tolerable degree of certainty that such will be the case.

The prominence given by courts to this matter of danger seems to imply that the only function of hospitals and asylums is to take the custody of such insane as are unsafe when at large, and without friends to care for them. Hundreds of years ago, such was undoubtedly the fact; but in our days, thanks to modern philanthropy, these establishments are arranged and managed with the special purpose in view of curing the disease, and restoring the sufferer to society. For this eminently proper and commendable purpose they are resorted to by thousands, as medicinal springs and water-cures are for the relief of bodily diseases, with as little thought of law in the one case as in the other. It is not easy to see the justice of prohibiting the friends from doing that for the restoration of the patient, which they may do for the protection of society against contingent danger. If the latter is deemed a sufficient reason for staying the normal operation of the law, certainly something may be claimed, on this score, in favor of the former. The remarkable change that has been effected in hospitals for the insane, whereby, instead of being dreary prisons for the safe keeping of dangerous people, they have become pleasing abodes furnished with every appliance for promoting the mental and physical comfort of their inmates, and fitted by all their arrangements to reclaim the wandering mind, — this change, it seems, is to be completely ignored by the ministers of the law. It is to be regretted that from such a quarter any countenance should be afforded to the vulgar notions which represent these useful and benevolent institutions as prisons, Bastiles, into which those who enter leave all hope behind.

But it is not merely for the curable and the dangerous classes, that hospitals are established. There are a multitude of other mental conditions that require their peculiar ministrations, and many other ends to be obtained besides the cure of the patient, and the safety of his friends. The comfort of individuals, the peace of families, the good order of society, are objects as clearly

within the scope of the operations of a hospital, as the cure of the curable and the custody of the dangerous. There is that large class without near friends or relatives, whose freaks and fancies render them improper inmates of a private family. There are those who wander from their homes, and expose themselves to serious privations and dangers. There are men who preach or proclaim their delusions in the streets, followed about by a rabble of men and boys. There are women who fancy themselves in love with men, and persecute them with their unseasonable attentions. There are those who disregard all the conventions of society, entering houses at unsuitable times, dressing without thought of the customary proprieties, or even decencies, stirring up strife between neighbors, spreading discord and confusion wherever they go, and exciting the alarms of the weak and timid. There are those who, while under the easy and uniform restraints of a hospital, are harmless and comfortable, but become dangerous subjects the moment they take their accustomed place in society, in full control of themselves and their families. Now, are all these afflicted ones to be denied the care and protection of the hospital because they are neither curable nor technically dangerous? If such is the law, have we not good reason to say that the law is regardless of that advance in Christian sentiment, which, in these our days, would bring within the benign influences of the hospital all the unfortunate victims of mental infirmity?

In the Nyce case, the judge had some conversation with the patient, on the strength of which he remarks, that "it must be conceded that the relator has sufficient intelligence to remember and detail the history of his family and business life;" and concludes that, "even if partially insane, it might be a serious question whether a court upon a finding of lunacy would order his confinement in an asylum." In other words, the opinion of the judge, unaffected by the mistake, probably of the reporter, of attributing the duty of the guardian to the court, is that partial insanity does not warrant the confinement of the insane. We are not told precisely how this form of disease differs from other forms; and yet if this is to be the rule, such knowledge would seem to be indispensable. Let us see, then, for ourselves what ground there is for this distinction.

The use of certain terms, as a matter of convenience, rather than as an expression of a scientific fact, has led to a widely prev-

alent error respecting the nature of insanity. Excepting in a few forms of mental disease, such as raving mania and the last stages of dementia, where the power of correct reasoning is entirely lost, some of the mental operations of the insane are conducted with ordinary correctness. On many subjects the judgment is as sound as ever, the power of adapting means to ends is unimpaired, the perception of moral relations is scarcely obscured, and to the casual observer no indication of insanity whatever may appear. We are not referring to monomania, strictly so called, — a mania which is confined to a single idea, — but to insanity generally, in which time and occasion only are needed to show that the mental operations are extensively involved. They may show that this person, so calm in his manner, so judicious in his remarks, so pure and high-toned in his feelings, entertains notions respecting the doings and designs of certain individuals, as baseless as the fabric of a vision, which no argument nor proof of any kind can make him abandon. Impelled by these notions, and utterly ignoring the laws of God and man, he is ready to commit some violence upon the supposed offender, as if it were something both right and necessary for him to do. Every week the newspapers relate some dreadful atrocity committed by persons who were only partially insane. Indeed, it is this very ability, still left them, to pursue a connected train of thought, to make plans and arrangements for future action, that makes them far more dangerous than they are whose minds are in a state of general bewilderment and confusion. This great mistake respecting the extent of the morbid influence exerted by disease is one which the world is reluctant to correct. It meets our notice on the bench and at the bar; in the circles of the refined and educated, as well as of the coarse and ignorant. It is made an occasion of hardship and wrong to the unfortunate and helpless, and blocks the way to every improvement in the administration of the laws.

Another reason assigned by the judge why a person partially insane should not be kept in an asylum, is derived from Dugald Stewart. "It is a question," says this eminent philosopher, "whether certain kinds of insanity have not a contagious tendency. That the incoherent ravings and frantic gestures of a madman have a singularly painful effect in unsettling and deranging the thoughts of others, I have more than once experienced in myself; nor have I ever looked upon this most afflicting of all specta-

cles, without a strong impression of the danger to which I should be exposed if I were to witness it daily." All this amounts to nothing except to show what wretched logic even a great metaphysician may be guilty of. It is very much as if he had said, "I am so terribly afflicted with bunions, that it gives me extreme pain to walk a quarter of a mile; therefore I advise everybody to refrain entirely from walking;" or, "I have more than once experienced great pain and irritation in my eyes when reading by gas-light, therefore every man who reads by gas-light does it at the peril of his eyes." Although not strictly germane to the matter in hand, we cannot forego the opportunity to say that Mr. Stewart's experience is exceptional; that of the hundreds of sane people, within our cognizance, who have been closely associated with the insane in large establishments, for years together, we cannot call to mind one who became insane, or was likely to be so. No doubt where there is a strong disposition to the disease, such association tends to develop it; and this effect is especially obvious where the parties brought together are nearly related, and the offices of care and attention naturally incident to such relation draw largely on the bodily strength and the moral emotions. The danger arising from this cause is often a sufficient reason for removing the patient from home and the customary surroundings. But however that may be, the question is not as to the effect upon sane people of intimate association with the insane. Even if it were as bad as the court would have us believe it is, it would not follow that the partially insane would be likely to lose the little sanity that remains, by associating with persons more insane than themselves. Such is not the experience of men who have had charge of thousands of patients and observed them under every possible variety of influence. For the most part, the insane are too much occupied with their own condition to be troubled by the conduct or discourse of others. A few, perhaps, would find fresh occasion for their morbid suspicions and alarms, by being exposed, indiscriminately, to other patients; but it must be understood that, in modern hospitals for the insane, the means of classification are so ample that the mischief which might result from improper associations is reduced to almost nothing. Those who are likely to annoy one another are easily kept apart, and those are brought together who would exert a salutary, or at least a negative, influence, on others around them. If the court supposed that the relator, in this case,

was in danger from his associations, it is to be regretted that the medical gentlemen who had charge of him were not particularly examined on that point. Their testimony would have furnished far better grounds for a practical conclusion, than the nervous apprehensions of Dugald Stewart.

Another reason advanced by the court for the discharge of Nyce is strictly legal; yet, without undue presumption, we think we may venture to examine it. "A judge," it is alleged, "has no power upon *habeas corpus*, to make a decree which may result in imprisonment for life, without the chance of a jury trial. . . . A man is sent to an insane asylum by his relatives and family physician. They institute no proceeding in lunacy, but deprive him of liberty and property, without any direct sanction of law. . . . At last he is able to sue out a writ of *habeas corpus*, and comes before a judge who cannot be expected to be an expert upon such a question, and who, looking at the evidence, concludes that the man is insane, and remands him. It is then *res adjudicata*, and it might be that no other judge would review the decision. Thus, without a finding of lunacy, without the right of traverse to a jury, or appeal to the Supreme Court, to correct errors in the proceeding, a man may be detained for life."

Now, to our apprehension, no mode of legal procedure is so well calculated to determine the truth in cases like these, as a hearing under a writ of *habeas corpus*. The judge is not an expert, it is true, neither are jurymen. He can have the testimony of experts, and they can do no better. In regard to these as well as other witnesses, he enjoys a privilege that does not exist in a jury trial. He can continue the hearings until he has had the fullest opportunity to learn the merits of the case. Supposed, as he is, to be a man of considerable culture and some knowledge of men, he would be far more likely to weigh the evidence correctly and discern its real significance, than the ordinary run of jurymen, who are totally unfitted by education and habits to appreciate the value of testimony on a question so strictly professional as that of insanity, to say nothing of their liability to be governed by prejudices or whims. Surely, if there is any description of cases more likely to be adjudicated correctly by a judge than by a jury, this is it. We cannot see how a case thus disposed of becomes *res adjudicata*, in the sense attributed to it by the court. What is to prevent the same or any other judge from reviewing the case after the lapse of a few

months? The condition of the person may have so changed within that period as to furnish satisfactory reasons for again issuing the writ. Certainly, no judge would refuse to grant the writ, under such circumstances. Neither is it very clear how the decision of a judge can keep a patient in confinement for life any more effectually than the verdict of a jury. They both fulfil their appropriate purpose of declaring authoritatively as to an existing state of facts. What the facts may be at some future period, it is for future judges to determine. The verdict of a jury convened by a commission of lunacy does not place a man in confinement. It may authorize the guardian or committee to do it, and his action could be traversed only by a writ of *habeas corpus*. Without that, it may be a confinement for life, if he and the keeper will it.

Another reason assigned by the court for its decision in this case is, that a judge may err; and in this connection the opinion of Spurzheim is quoted, that even experts may err, for they certainly disagree. Unquestionably, judges and experts are both liable to mistake; nevertheless, the law requires that in certain cases the judge shall decide without the intervention of a jury, and permits experts to testify, however widely they may differ from one another. Their differences may embarrass a jury even more than they would a judge, unless they determined in the outset, after the manner of juries, to give no heed to them whatever. "Spurzheim," says the court, "was not willing to trust the solution of such questions to the medical experts." What Spurzheim actually said will hardly bear this construction; for his statement as quoted by the court is, that, "as sometimes the most experienced and able men are at a loss and find it impossible to decide whether there is insanity or not, it must be obvious that not every one who knows how to compose some prescriptions ought to be trusted with the privilege to dispose of the liberty of his fellow-citizens;" meaning, of course, that as the most accomplished expert may sometimes doubt, it would be improper to rely on the opinion of a mere compounder of prescriptions. He expresses neither willingness nor unwillingness to trust the solution of such questions to medical experts, for that was not the point he was considering.

The reason assigned in the case of Moore, for the discharge of the patient, would be equally applicable in a large proportion of the cases in our hospitals, and therefore deserves to be carefully examined. Undoubtedly there is a patient now and then, whose

convalescence would be as speedily conducted to the last stage of recovery at home as in a hospital; but it is difficult to distinguish them from the much larger portion who would be grievously injured by the change. Friends often solicit it, and no duty incumbent on the physician is more embarrassing, more requiring a readier discernment of the countless phases of mental disorder, more practical sagacity in penetrating beneath the surface, than to meet their wishes judiciously. In most instances where the step is taken against his advice, the experiment fails, and a protracted continuance of the disease, if not an utterly incurable condition, is the result. And the cause will be obvious on a little reflection. The period of convalescence is precisely that of all other stages when the peculiar management of the hospital is needed to complete this process surely and safely. The patient's reason has returned; he sees things and persons in their true aspect; he feels that buoyancy of spirit which usually accompanies returning health; he becomes impatient of confinement because he cannot see its necessity; his friends yield to his importunities, and he becomes again the master of his own movements. With a brain still weak and irritable, wanting that firmness which only time and rest can give, he resumes at once his ordinary habits and pursuits, turning a deaf ear to all advice, soon uses up all his little power of endurance, loses all self-control, and again passes under the cloud. Had he continued a few weeks longer under the gentle restraints of the hospital, and its carefully measured indulgences, the requisite degree of nervous hardihood would have been acquired, and he would have been prepared to encounter successfully the trials of unrestricted freedom. The courts may only claim the right to discharge those whose convalescence is fully established; but in thus deciding what is a purely medical question, let them consider that they assume the functions of the physician. If the physician hesitates to take this, perhaps the most important, step in the management of an insane patient, still discerning under his constant observation some lingering traces of disease, some indications of irritability that might be readily converted into uncontrollable excitement, well may the judge shrink from assuming the delicate and responsible duty.

This review of the judicial aspects of the case shows that the common law is quite unreliable for any practical purpose. By one court, it is decided that the friends of an insane person have no

right to confine him, except to meet some pressing emergency, and then, only for a period long enough to enable them to resort to some legal process. By another, it is decided that they may thus dispose of him as long as he continues to be dangerous. By one court, this matter of danger is regarded as strictly medical, to be determined by experts; by another, it is treated as if it were clearly within the province of the court, the opinions of the experts being overruled, it may be, by the opinions of the judge. One court recognizes this right of friends to confine the patient, without regard to any particular element of the disease, but decides that it terminates when the stage of convalescence begins. Another decides that this right is absolute and unconditional, unrestricted by any stage or quality of the disease. It is obvious, therefore, that additional legislation is required in most of the States, and the question is thus directly before us as to the legal provisions that would most effectually meet the necessities of the case. And let us first clearly understand what these necessities are.

In the first place, the law should put no hinderance in the way to the prompt use of those instrumentalities which are regarded as most effectual in promoting the comfort and restoration of the patient. Secondly, it should spare all unnecessary exposure of private troubles, and all unnecessary conflict with popular prejudices. Thirdly, it should protect individuals from wrongful imprisonment. It would be objection enough to any legal provision, that it failed to secure these objects, in the completest possible manner.

It is a fair question, certainly, whether the forms and processes now in use would not sufficiently answer the purpose, if applied to all cases indiscriminately. This question we propose to answer.

In every State, the law provides for the appointment of a tutor, guardian, trustee, or committee, who has charge of the person and estate of the insane person. In some States, the mode of procedure is a simple hearing before some judicial officer, who, if convinced of the person's insanity, appoints a guardian. In others, some court appoints a commission, who, acting in connection with a jury, inquire into the facts, and make report to the court, by whom a guardian or committee is appointed. Now, it is proposed to make it obligatory on the family or friends of the patient to place him under guardianship, in order to procure his admission to any hospital for the insane. It would be a sufficient objection to this course, that there is no necessary relation between the two things, —

placing a person in a hospital for the purpose of procuring his recovery, and subjecting him to interdiction. This is clearly shown by the customs of our people; for of the thousands of persons in our hospitals and asylums, not one in twenty is under guardianship. Had there been any thing essentially wrong in this, it would hardly have been left to this day and generation to discover it. No one, with any practical knowledge of the matter, — of the feelings and motives that govern men when brought face to face with the question of confining an insane friend, — can fail to see that this course is quite incompatible with the first two requisites above mentioned. What is implied by interdiction? It implies the taking of property out of the hands of its rightful owner, and giving the control of it to another. It implies the settlement of his affairs, the termination of his business relations, the dissolution of partnership, the resignation of every office of honor or trust, — all in a manner more or less prejudicial to his interests, and solely to meet an exigency that may be of very brief duration. Surely, an attack of insanity is afflictive enough, without any supererogatory misery like this. It would be difficult to give even a plausible reason why a person laboring under a disease of the mind should be treated so differently, in this respect, from one sick with pneumonia or fever. Nobody thinks of placing the latter under guardianship, in order to get him into a fever hospital; and yet he may be confined to his house, and incapable of taking care of himself, for as long a period as the former.

There is another and a very important reason why this measure should be avoided if possible. When the patient comes to himself, and learns that his business, successfully established by many years of industry and enterprise, has been wound up, at considerable sacrifice, as he must know, and that he is unable to dispose of a single dollar of his hard earnings, the intelligence will scarcely help to promote his recovery. It will lead many to think that admission to the hospital has been purchased at too dear a rate; and, if they have been filled with suspicions and apprehensions, they will find in it confirmation of their belief, and imbibe feelings of hostility that may remain after all other traces of disease have disappeared. And when released from restraint, instead of being welcomed back to his old pursuits and the familiar scenes, and cheered by the fact that his business relations have been maintained at little or no loss, he finds himself obliged to renew the

struggle of life, in new ways and with new associates; and fortunate will he be if the effort prove not too much for a brain rendered morbidly irritable by recent disease. Physicians who have charge of hospitals for the insane are in the habit of advising the postponement of interdiction to the latest moment; and in a public communication the English Commissioners in Lunacy once gave similar advice. "It is hardly necessary to observe," they say, "that proceedings by commission are, generally speaking, advisable only where the insanity is likely to be of a permanent character. . . . Wherever a reasonable hope of recovery exists, and the income of the lunatic can, in the mean time, be properly administered for his benefit, without a commission, the general practice among the friends and relatives of the insane is to avoid resorting to proceedings which entail unnecessary cost, which, by the disclosures they occasion, are most painful to the feelings of the family, and which, by the excitement they produce, are sometimes injurious to the patient himself."

It is easy to see, in view of such discouragements, what would be done with the patient, or rather what would not be done with him. He certainly would not be sent to a hospital, if by any possibility he could be kept at home, or somewhere else. Every makeshift would be resorted to that friends and neighbors could suggest, every experiment would be tried offering the least prospect of success. Not until all these have had their turn and failed, and the friends have become wearied and worried to the last point of endurance, the patient meanwhile getting more and more difficult to manage, would the hateful measure be submitted to, which is needed for his admission to the hospital, too late, probably, to be benefited by its kindly influences.

It is now well understood that, in most cases, an attack of insanity is most speedily conducted through its various stages towards recovery, within those establishments that have been expressly designed for this purpose; and that the sooner they are resorted to, the better, unless special and exceptional circumstances forbid it. Experience shows that the sooner all connection with domestic associations and familiar scenes is severed, and all intercourse with friends and acquaintances suspended, the sooner the morbid process will be stayed, and the work of restoration begun. Whatever tends to discourage this measure, — to favor its postponement until every other has been tried and has failed, — must

prove prejudicial, both to the patient and his friends. It does not meet the difficulty to say that this reluctance is unreasonable, a mere matter of prejudice, and that if people refuse to comply with the laws they must abide by the consequences. It is not very unreasonable, surely, to wish to avoid a certain positive evil, though at the risk of encountering a greater one that may never happen. It is immaterial whether the measure in question were avoided for the wisest of reasons, or the most senseless of prejudices. We must legislate for men as they are, not as they should be, having reference to their customs, their feelings, as well as their abstract sense of right and of the fitness of things. Laws, the best in the world, theoretically considered, fail to effect their purpose when not in harmony with the ways, manners, usages, and spirit of the people for whom they are made. Believing, therefore, that to make interdiction preliminary to isolation would cause infinitely more mischief than it would prevent, we are obliged to look for some other way less burdened with objections.

In most if not all the States, there is a provision whereby a magistrate, generally of the lowest grade, is authorized to send to some place of custody any insane person going at large and declared to be dangerous, though these conditions are much like those fictions of the law that are not to be literally construed. Although originally intended as a measure of police, applicable to insane vagrants, it is sometimes used to secure the isolation of persons having friends and social position. But there are serious objections to its being employed for this purpose. Having been in use from time immemorial as a police measure, and, consequently, associated with the idea of vagrants and dangerous subjects, the friends, naturally enough, shrink from it; and the patient, if not entirely devoid of reason, conceives that he is treated as a criminal, and is vexed and irritated accordingly. Nevertheless, it has some advantages over the last-mentioned measure. It is prompt in its operation, and affects the person only, and not the property.

People who have little knowledge of insanity, and a great deal of faith in time-honored phrases, have proposed, as a preventive of the abuses incident to isolation, a trial by jury, impanelled especially for the purpose. This method has been actually adopted in Illinois by legislative enactment, under a pressure of popular excitement arising from accidental causes. Except that it leaves the property undisturbed, it is open to all the objections that lie against

the measures already considered. It is equally shocking to every notion of domestic propriety, and equally repugnant to that instinctive delicacy which shrinks from exposing the infirmities of those we love. A jury trial is a public affair: the proceedings may be printed in the newspapers, and the griefs of a stricken family become food for heartless gossip. A grosser perversion of this noble institution from its proper ends can scarcely be imagined. Although an admirable contrivance for eliciting truth in disputed transactions between man and man, it is totally unsuitable as a means of obtaining correct results in regard to questions purely scientific. When we are told that in the place where it was adopted, all the patients in a large public hospital — the epileptic and the paralytic, the idiotic and the imbecile, the raving maniac and the poor demented creature not knowing his right hand from his left — were subjected to its operation, it seems more like a phantasmagoric jumble of social and legal proprieties, —

"The brood of folly without father bred," —

than the work of the assembled wisdom of a large and intelligent State.

Let us look at it for a moment. The question for the jury to decide, is, whether the person before them is sane or insane. The friends and attendants tell their story, the family physician, and perhaps other experts, give their opinions, and then the jury must agree or disagree upon a verdict. In will or contract cases, where the mental condition of the party is in question, there are always side issues on which a verdict may be made to rest, irrespective entirely of the principal issue. But here the naked question, sanity or insanity, is the only possible avowed issue, and it must be squarely met. If they are sensible men they will be governed by the views of the experts. If, as is more probable, they think that they, as well as doctors, know something about insanity, they will have an opinion of their own, and decide accordingly. Now, in the former instance, it is the experts who really decide the case, and the jury becomes a superfluous appendage to the procedure. In the latter, a question of medical science, involving the happiness of families, and the highest welfare of an individual, is determined by men completely ignorant of the whole subject. In all jury trials, the jury are not allowed to be judges of the law. Are they any more competent to be judges of medicine? If it were a ques-

tion between medical men whether a certain patient had this or that affection of the heart, or whether another is suffering from rheumatism or neuralgia, who would think of submitting it to a jury of twelve men drawn from the common walks of life? And yet this is just like what we propose to do when we undertake to settle the question of insanity by means of such a tribunal. Only those who are much acquainted with the popular notions of insanity can conceive how futile the result would be. For twenty-five years the writer of this was in charge of a hospital for the insane; and of the many hundred patients under his care, — setting aside the raving and the demented, — there was scarcely one who was not regarded by some friend, neighbor, or acquaintance, as unequivocally sane. The most common forms of insanity — those which include the great majority of cases — are regarded, by many people, no small portion of whom may be found among the refined and educated classes, as any thing but insanity. So surely as this question is given to a jury who undertake to think for themselves, just as surely will they fail to agree upon a verdict.

People who expect to find in legislation a panacea for all social evils have imagined that the requirements of the case would be met by the appointment of a commission whose business it should be to take cognizance of every case proposed for admission into a hospital, and give or withhold its sanction. It might be a permanent board consisting of a few members, or the duty might be performed in each town or county by some resident therein appointed especially for this purpose. While this is regarded as a mere matter of form, very little can be said against it, or for it. But in order to prevent the abuses which are supposed to be so imminent, a regular inquisition is necessary, conducted strictly according to the forms of law. Any good which this procedure may possibly accomplish, would be obtained at the sacrifice of many important objects. For, observe how it would work practically in a case of acute mania, as it often appears. The patient is noisy, boisterous, and self-sufficient, bent on going out about his business, and threatening violence to all who endeavor to prevent it. He refuses proper food and medicine, perhaps insists on having stimulants, and requires the unremitted attention of two or three men. The house is in confusion, the family are frightened, attendants are obtained with difficulty, and every day reveals some fresh phase of the trouble. Endurance is possible no longer, and

application is made to the commissioner. He appoints a day for hearing the case, and notice is given accordingly in the public papers. Counsel appear for the patient and solicit more time for preparation. Of course, the request must be granted, and another week or ten days of agonizing care and anxiety must be endured. At the trial, the affairs of the family are laid open to the public gaze; the actions and the discourse of the patient are described in his presence by those who would, in the natural course of things, regard them as something they were bound by every sentiment of honor and propriety to conceal; and when, at last, the commissioner signs the order for his admission to the hospital, he goes with redoubled excitement, and with tenfold hostility towards those who have never ceased to love and protect him. If the patient is really insane, — and such is admitted to be the fact in the great majority of cases, — what method could be better calculated to exasperate him to fury, and, on recovery, to overwhelm him with mortification and shame?

In view of the very strong objections that lie against all these methods, it becomes a fair question whether we can do better than retain the old one, whereby the friends assumed the management of the case, acting according to their best judgment under the advice of friends and physicians, and legalize it by a statutory enactment. That it possesses the first two requirements above mentioned, — the prompt isolation of the patient and the relief of the friends, — is not disputed. Can it not be accompanied by conditions that would secure most effectually the third requirement? If it can be shown that this matter has been much misunderstood, that the apprehended evil, judging from the past, is one of the very smallest dimensions, and that by suitable safeguards it may be rendered as little liable to abuse as any transaction between men, then, surely, there can be no reason why a practice so natural, so consonant to our best feelings, and so conformable to our customs, should not be continued. The complaint is that under the exercise of this privilege sane men and women have been imprisoned for an indefinite time. That such a thing is possible, that it may have actually occurred, we do not deny. But, at the worst, it must have been of very rare occurrence, because superintendents of hospitals who have had charge of thousands of patients, and whose opportunities of knowing, therefore, are larger than those of all other persons put together, tell us they have met with

scarcely a single case of wrongful imprisonment; and because the alleged cases when impartially investigated do not sustain the complaint. The prevalent notion on this subject has been derived, in some measure, from novels and periodicals, where cases of this kind, by the license allowed to such writers, have been used to heighten the interest of the story. It only indicates that change in modern civilization whereby much of the old machinery of the poet and story-teller has become effete, and thus it happens that the castle and convent and poor debtors' prison, as places for confining luckless heroes and heroines, have given way to lunatic asylums. They have many qualifications for this purpose. Their walls are strong, their windows barred, their doors locked, and, though utterly devoid of cells and dungeons, it required no great stretch of the imagination to conjure them up. Thus, it is not strange that readers who readily believe whatever they find in print, should get the impression that cases so represented are, if not literal facts, founded in fact, and express an actual reality.

But the most prolific source of the prevalent impression on this subject is, unquestionably, the stories of the insane themselves. Generally, insane people do not regard themselves as insane, and, consequently, can see no reason for their confinement other than the malevolent designs of those who have deprived them of their liberty. And they are all the more inclined to this conclusion by feelings of hostility already engendered towards their friends and all others who have exercised any control over their movements. Many of them are discharged, much improved, perhaps, but before they have fully come to themselves, and regained the power of seeing their relations to others in the true light. They are ready, on the first opportunity, to spread their fancied grievances before the public, and often with a degree of ingenuity that deceives even the cautious and intelligent. And the task is not difficult. A story circumstantially and plausibly told is universally regarded as presumptively true; and, if it is one of oppression and wrong, it enlists the deepest sympathies of the hearer. The hero or heroine of the story is invested with the character of a martyr, and people are filled with indignation and wrath at the thought of an act of high-handed oppression having been perpetrated in the very midst of them. Even if the exact truth of the case ever comes to light, — even if a trial at law reveal scenes of violence occurring day after day for weeks and months together within the family circle, a wife

or mother beaten and cursed, children frightened and running in terror from the house, and proves the existence of delusions as gross as ever usurped the seat of reason, — it fails to meet the eye of many who heard the original story, or is received with a feeling of more than distrust. Many are reluctant to admit that they have been deceived, and many are loath to give the lie to what has afforded them a thrilling sensation.

In England and France this right of the friends of an insane person to place him in a hospital without any process of law has always existed, and is now secured by acts of the legislature. The same may be said of Massachusetts, New Hampshire, and Rhode Island. In all these places the law requires compliance with certain conditions, the general purpose of which is to prevent abuses. The principal of these is a certificate of insanity signed by one or more physicians, and the application of some responsible person. In the "project of a law for regulating the legal relations of the Insane," which was unanimously sanctioned by the "Association of Medical Superintendents of North American Hospitals for the Insane," we find the following section: "Insane persons may be placed in a hospital for the insane by their legal guardians, or by their relatives or friends in case they have no guardians, but never without the certificate of one or more reputable physicians, after a personal examination made within one week of the date thereof; and this certificate to be duly acknowledged before some magistrate or judicial officer who shall certify to the genuineness of the signature, and of the respectability of the signer."

Under such a provision the insane may be promptly, quietly, and, with a few possible exceptions, rightfully, placed by their friends in some hospital for the insane. For the possible exceptions, we would have a provision applicable to them alone, and not, at the same time, subjecting all the rest to positive discomfort and injury. If the writ of *habeas corpus* should not be supposed to furnish sufficient relief, a commission might be appointed especially for this purpose. In the "project of a law" just mentioned, we find the following provision: "On a written statement being addressed by some respectable person to some high judicial officer, that a certain person then confined in a hospital for the insane is not insane, and is thus unjustly deprived of his liberty, the judge, at his discretion, shall appoint a commission of not less than three nor more than four persons, one of whom, at least, shall be

a physician, and another a lawyer, who shall hear such evidence as may be offered touching the merits of the case, and, without summoning the party to meet them, shall have a personal interview with him, so managed as to prevent him, if possible, from suspecting its objects. They shall report their proceedings to the judge, and if, in their opinion, the party is not insane, the judge shall issue an order for his discharge." True, this only abbreviates the wrong: it does not prevent it altogether. But when we consider how small it is, compared with the good which is accomplished, may we not fairly regard it as one of the unavoidable results of that imperfection which is incident to all human arrangements, and which we witness every day of our lives, even in this very matter of wrongful imprisonment? Men are arrested, kept in durance, charged with a criminal offence, and yet found on trial to be innocent of the charge, — the victims, perhaps, of conspiracy or perjury. This is no rare, extraordinary thing, — one case in ten thousand, — kindling the wrath of every newspaper-writer in the land, and calling for special and summary legislation, but an every day occurrence, exciting as little feeling as the most common operations of nature. We are told very calmly that such wrongs are a part of the price we pay for public order and good government.

Justice to all parties requires some such legislation as we have proposed. That it would prevent all popular clamor, now so loud and wrathful, we do not believe. That will continue as long as the wrongful imprisonment of sane persons is capable of adding to the interest of a novel, or as long as the stories of the insane are received by credulous people as unqualified truths.